

The Gazette



India

EXTRAORDINARY

PART II—Section 3

PUBLISHED BY AUTHORITY

 No. 143] NEW DELHI, TUESDAY, JUNE 29, 1954

ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi, the 16th June 1954

S.R.O. 2099.—Whereas the election of Shri Ram Charan Singh as a member of the Legislative Assembly of the State of Bihar, from the Kurtha constituency was called in question by an election petition presented by Shri Shah Umair Saheb, son of Shah Md. Ishfaq Hussain village Mukhdumpur Kabir (Arwal), P. S. Arwal, district Gaya;

And whereas the Election Tribunal appointed by the Election Commission for the trial of the said petition dismissed it by an order dated the 29th January 1953 and thereafter ceased to exist;

And whereas the High Court of Judicature at Patna, on the application of the petitioner has set aside the said order of the Election Tribunal;

And whereas the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of Section 86 of the Representation of the People Act, 1951 No. XLIII of 1951 for the further trial of the said petition has, in pursuance of the provisions contained in Section 103 of the said Act, sent a copy of its order to the Commission;

Now, therefore, in pursuance of the provisions of Section 106 of the said Act, the Election Commission hereby publishes the said order of the Tribunal.

BEFORE THE ELECTION TRIBUNAL, PATNA

ELECTION CASE No. 113 OF 1952

PRESENT:— Shri S. N. Imam, *Chairman.*
 Shri Ramanandan Prasad, *Member.*
 Shri K. D. Chatterjee, *Member.*

Shah Umair Sahib.—*Petitioner**Versus*

1. Sri Ramacharan Singh,
2. Sri Paras Nath Sharma,
3. Sri Raja Ram Singh,
4. Sri Raghu Raj Singh
5. Sri Ram Parkash Mahton,
6. Sri Sia Saran Singh,
7. Sri Balmiki Mahton.

For the Petitioner—

Shri S. Basiruddin, Barrister-at-Law.

Shri Balbhadar Pd. Singh, Advocate.

Shri Abul Fateh Syed Mohammad, Advocate.

Shri Brajkishore Narain, Advocate.

For the Respondent No. 1—

Shri K. P. Verma, Advocate.

Shri Awadhesh Nandan Sahay, Advocate.

For the Respondent No. 3—

Shri Deokinandan Pd. Sinha, Advocate.

Shri Rajdeo Prasad Sinha, Advocate.

This is a petition under Part VI Chapter II of the Representation of the People Act (No. XLIII) of 1951 (hereinafter referred to as "the Act") for setting aside the election to the Bihar Legislative Assembly from the single member Constituency of Kurtha (Constituency No. 26). The petition, as originally filed, implead as respondents four persons who actually contested the election and who are Respondents 1 to 4. Respondents 5, 6 and 7 were not added as parties. It may be mentioned that these three persons although duly nominated had withdrawn from the election. The petition was heard by a tribunal at Hazaribagh before which a preliminary issue was raised that the petition was not maintainable for nonjoinder of the three candidates who are now respondents 5 to 7. By a majority decision this issue was decided against the petitioner and the petition was dismissed on that ground alone being in contravention of Section 82 of the Act.

The Tribunal further held that they had no power of allowing amendment of the petition and addition of the parties concerned. Against the decision of the tribunal, the petitioner filed an application under Article 226 and 227 of the Constitution of India to the High Court at Patna. The High Court by its decision dated the 8th September, 1953, set aside the order of the tribunal and in pursuance of the High Court's decision this tribunal has been constituted for hearing of the petition on merits. An application was filed before us for addition of respondents 5 to 7. This application has not been opposed and accordingly we have allowed Respondents 5 to 7 to be added as parties.

Apart from the amendment referred to above by addition of respondents 5 to 7, the case proceeded to trial on the pleadings that were before the Hazaribagh tribunal and substantially on the same issues as were framed by that tribunal. The issues, however, were recast and by agreement of the parties certain issues were deleted and certain others added.

The Kurtha Constituency is comprised of Kurtha and part of Arwal Police Stations. The petitioner belongs to Arwal Police Station and the Respondent No. 1 to Kurtha P. S. The Petitioner was the only Muslim candidate. The Constituency is said to be a predominantly Bhumihar Constituency. There are roughly 60,000 voters in this Constituency about 40 per cent. of which, that is roughly 23,500 voted. The Respondent No. 1 secured the highest number of votes i.e. 10,555 and was declared to be duly elected. The Petitioner polled the second highest number of votes i.e. 9,994.

The Returning Officer in the Constituency was the Sub-Divisional Officer of Jehanabad, Shri B. S. Mukherjee. There were 56 booths at which polling was conducted on different dates by 7 officers. Two of them may be mentioned here, Shri B. P. Singh and Shri R. P. Singh, who were in charge of 17 booths. The petitioner contends that in these 17 booths he lost heavily due to hostility of these two officers and the corrupt practices and illegalities committed by them.

The Petitioner has set out a long list of irregularities, illegalities and corrupt practices committed during the election. His specific allegations will be dealt with under each issue but the main grounds on which the election is sought to be set aside may be stated at this stage. It is alleged that the Returning Officer and the two Presiding Officers mentioned above were hostile to the petitioner and interfered with the free exercise of electoral rights by exercising undue influence on voters and some candidates; that the Returning Officer set up polling booths at places other than those notified in the Gazette to suit the Respondent No. 1; that Respondent No. 1 was responsible for staging a drama named 'Kasai' with the connivance of the Returning Officer with the object of

inciting Hindus against the Muslims. It is further alleged that various illegalities were committed by the Returning Officer during the counting of votes. Among the illegalities at the various polling stations instances were mentioned of double voting, impersonation, refusal to record some votes, deprivation of franchise of a large number of voters by early closing of a polling station, fabrication of false accounts of ballot papers etc. Upon these allegations the Petitioner prays (a) that the election of Respondent No. 1 be declared void, and (b) that the petitioner be declared duly elected from the Kurtha Constituency.

The written statement of Respondent No. 1, who will hereafter be referred to as "the respondent" contains merely the denial of each of the allegations of the petitioner. It is not, therefore, necessary to state what his specific case is except as to one matter, that is, the allegation about the drama 'Kasai'. The Respondent in paragraph 9 of his written statement does not deny that the drama was staged at village Kurtha but says that it was staged with permission of the S.D.O. and after enquiry by the Superintendent of Police, Gaya, and that he himself had nothing to do with the drama.

Respondent No. 3 has filed a written statement and has prayed that the election of the Respondent be declared void. His case briefly is that the Respondent is not a duly recorded elector and therefore was not qualified to stand for election. He also supports some of the allegations of the petitioner regarding illegalities committed by the Returning Officer.

The other Respondents have not appeared. Upon the pleadings of the respective parties the following issues have been framed by consent of parties:—

1. Is the petition maintainable in its present form?
2. Was the drama 'Kasai' staged and managed by Respondent No. 1, his agent and his group? Did they thereby become guilty of stirring up communal hatred and thereby prejudicing the election?
3. Did the Returning Officer commit corrupt and illegal practices and other acts in contravention of the provisions of the Representation Act and the Rules framed thereunder as detailed in the election petition? Did he do so with the connivance of and in collusion with Respondent No. 1 with a view to procuring his election and defeat of the petitioner?
4. Did the Presiding Officers of various booth commit illegalities and irregularities at the time of polling as alleged in the election petition such as refusal to issue ballot papers to voters and to allow false personation and submitting false account of ballot papers? Were they acting in the interest of Respondent No. 1 with his connivance and in collusion with him?
5. Whether Form No. 10 were not properly filled in?
6. Was there double voting as alleged in the petition?
7. Was the election of Respondent No. 1 procured and induced and was the result of the election materially affected by the corrupt and illegal practices and other illegal acts done by the Returning Officer and his subordinates as alleged in his petition?
- 7(a). Whether the polling booths had been changed as alleged?
8. Whether the counting of votes was conducted in accordance with law by the Returning Officer?
9. Whether polling was conducted by the Presiding Officers R.P. Sinha and Bachu Singh in invalid, illegal and improper manner?
10. Whether the ballot boxes of petitioner were tampered with?
11. Whether the petitioner's counting agent was deprived of proper facilities at the time of counting?
12. Whether the petition is entitled to have himself declared as duly elected?
13. To what relief, if any, is the petitioner entitled to?

Issue No. 1.—The point raised under this issue was that a number of allegations in the petition are not supported by sufficient particulars as is required by section 83(2) of the Act. Mr. Verma for the respondent eventually conceded that the entire petition is not liable to be thrown out because some of the allegations are without sufficient particulars. Consequently we must answer the issue in the affirmative.

Issue No. 2.—Although in the view that we take of the evidence this issue is very simple, it will be dealt with at some length as both sides have advanced strenuous and lengthy arguments. It is agreed between the parties appearing before us that four questions arise under this issue.

- (1) Whether the play 'Kasai' has a tendency to incite hatred against Muslims or is in any way objectionable;
- (2) Whether it was actually staged;
- (3) Whether Respondent No. 1 was in any way responsible for its performance.
- (4) Whether it had any effect upon the electorate.

On the first question there is serious difference between the Petitioner and the Respondent. Mr. Bashiruddin, counsel for the Petitioner, has strenuously urged that the play is highly objectionable as it depicts Muslims in villainous roles and that the intended effect of the play was to rouse hatred and anger against Muslims. Alternatively he argues that even if that was not the effect intended by the author it was certainly likely to produce that effect on the audience. The Respondent says that there is nothing in the play that is capable of producing the suggested effect and the whole issue, therefore, is inconsequential. The opposite points of view pushed to the logical extreme come to this: according to the Petitioner whatever be the intended effect and theme if it is capable of exciting feelings of Hindus against Muslims it is objectionable. The Respondent says that if the play is neither intended nor capable of producing such effect on reasonable persons it does not become objectionable merely because some ignorant fools of perverted mentality may possibly be agitated by the play. The question is of some importance which can be illustrated by the analogy of the law of defamation. In England, where, in a case of defamation, the jury have to decide the facts it is for the judge to say whether there is evidence to go to the jury. The judge has to decide whether the alleged statement is capable of a defamatory meaning. The decision depends on the issue of fact [See *Capital Counties Bank Vs. Henty* (1882) 7 A.C. 741 and *Neville Vs. Fine Art and General Insurance Co.* (1887) A.C. page 68]. The position here is somewhat similar. According to the Respondent if the theme is not capable of being construed as communal further questions do not arise for determination.

Mr. Bashiruddin argues that in judging the effect of the play we have to apply the standard of an ordinary rustic spectator and not that of a refined critic. Applying that standard as best as we can we find it difficult to believe that even an ignorant villager can carry an impression that the play was directed against the Muslim community. The theme is not disguised by any subtlety. The play begins in the background of the Bengal famine during the last World War. There is misery and poverty and starvation everywhere and the rich capitalists have their opportunity to make profit out of the misery of the masses. The author depicts these capitalists as butchers (Kasai). Hunger and poverty drive women to deliver themselves as chattels to be traded in by the capitalists and to swell their profits. A profitable trade in cattle is established by forcing the starving owners to sell them cheaply. This, in the main, is the theme of the drama. It is heightened by gruesome scenes of women being kidnapped, ill-treated and beaten. The entire play is a tirade against the capitalists. It shows the ruthlessness and villainy of rich Hindu Seths, masquerading as holy men and employing agents both Hindus and Muslims in their nefarious acts. It is not necessary to examine the entire book. Almost all the passages were read out to us by counsel of both parties to draw particular inferences to suit their respective contentions. One such passage may be referred to on which Mr. Verma rightly laid some stress. It is a scene where, after days of starvation, a poor family had procured some rice and were about to partake of a meal. Suddenly there arose loud wailing from the house of a Muslim neighbour. A child had just died of starvation. The young man in the scene, Jatin, leaves his food declaring that it is impossible to swallow food when his neighbour Mahmood has lost his child. Mr. Verma comments that this passage clearly shows the sympathy between the communities in their common misery. Enough has been said to indicate the true nature of the play. A cursory reading will show that there is nothing against Muslims as such in this drama although there are two or three Muslim characters serving as henchmen of their Hindu masters. We hold, therefore, that the play "Kasai" has no such mischievous tendency as the Petitioner alleges.

On the fourth question formulated above we are unable to hold that the staging of this drama, assuming that it was staged, had any effect upon the electorate. The evidence is surprisingly meagre on this point. Of any tension created between the two communities there is no evidence whatsoever. Even as

to the reaction of individuals there is very little evidence. There is only one witness, P.W. 2, who says that some spectators objected to the drama but he adds that he himself did not object. There is nothing to show that there was any commotion when the drama was being played. No one has said that his feelings were roused against the Muslims. There is no indication of any subsequent disturbance or complaint regarding breach of peace. If the drama had any effect it is surprising that the Petitioner himself did nothing about it. He had shown considerable apprehension before the drama was played but is absolutely inactive after the performance. In fact we are asked to conclude that the drama had a mischievous effect not because, there is evidence of such effect having been produced but because, so it is argued, that is the natural consequence and we are further asked to draw the inference from the fact that the petitioner lost heavily in the four polling booths at Kurtha. Since the matter has been strenuously argued we shall examine it briefly.

In the four booths at Kurtha polling was as follows —

Date	Kurtha	Booth No.	Petitioner	Resp. No. 1	Resp No. 2	Resp No. 3	Resp. No. 4
14-1-52	"	28	70	176	10	5	47
15-1-52	"	29	209	111	16	9	11
17-1-59	"	30	195	319	26	16	9
18-1-59	"	31	127	386	84	5	10
TOTAL			601	992	66	35	77

The result shows that Respondent No. 1 got 992 votes, Petitioner got 601 votes and the three other Hindu candidates together got 178 votes. The Petitioner's argument is that Kurtha where the drama was played accounts for 391 out of the difference of 561 votes in the entire constituency polled by the Petitioner and Respondent No. 1 respectively. It is said that the drama is responsible for this set back of the Petitioner. This argument is a result of a common fallacy—*post-hoc ergo propter hoc*. At any rate it would be pure speculation on the part of tribunal to draw such an inference. Moreover the analysis of the figures will attenuate the point considerably. If the polling reflected the effect of the drama how is it that the Petitioner secured almost 100 votes more than the Respondent at booth No. 29? One would expect, if the Petitioner's contention is correct, a steady victory of the respondent in all the polling booths. Furthermore we would expect that out of the 600 votes secured by the Petitioner some would have gone to the other three Hindu candidates. Be that as it may, it is impossible for us to conclude that the staging of the drama 'Kasai' had in fact affected polling in and around Kurtha.

In view of our decision of the first and fourth points stated above the other two points lose their importance. But since the matter has been argued a brief finding will be necessary. As regards the second point the evidence has considerably narrowed down the controversy. It is admitted by the Respondent's witnesses (R. Ws. 1, 2 & 3) that the drama was rehearsed at a public place namely Kurtha Bazar. The Petitioner's case is that the drama was played with full notice and before a large gathering. On this point we are inclined to accept the Petitioner's version. It is to be remembered that the staging of the drama was not denied in the written statement. At any rate it is clear that there was a public display of the play "Kasai" in Kurtha Bazar on the 27th December, 1951. Whether it was a rehearsal or the actual performance before an audience does not appear to matter very much. The circumstances, however, show that the Petitioner's allegation is substantially correct. The petitioner himself had made a complaint to the S.D.O. in a petition on the 26th December, 1951 which is Ext. 1. In this petition he refers to a notice of an intended performance of this drama and shows considerable sensitiveness and apprehension regarding the possible repercussions. The S.D.O. made a note upon the petition (Ext. 1/1) which shows that he took the matter seriously. There was an enquiry at the instance of the S.D.O. by the Second Officer (R.W. 34) on 27th December, 1951. It is true that the Second Officer after examining the book did not consider that the matter was serious at all and that the S.D.O. on the 28th December, 1951 noted on Ext. 1 that it was reported that the drama was not ultimately staged. But there does not seem to be any point in holding a rehearsal on the 27th December, 1951 after the intention to perform the drama was actually abandoned and if the drama was not going to be played at all. We think that the admission by the Respondent in his pleadings and the circumstances show that the Petitioner's allegation that the drama was performed is correct.

The next question is how far the Respondent was responsible for staging the drama. On this point the evidence adduced on behalf of the petitioner is not satisfactory. What the petitioner himself (P.W. 27) states is mostly inferential. He speaks about his talk with the S.D.O. and the Chief Minister, Bihar who, according to his evidence, happened to pass Kurtha that night, of his apprehension regarding public excitement. But he was not there at the drama. He is not an eye witness to anything that might implicate the Respondent. It may be mentioned that there is nothing about the Respondent in the written protest submitted by the Petitioner to the S.D.O. (Ext. 1). The other witnesses are P.Ws. 1, 2 and 3. P.W. 1 appears to be interested against the Respondent as he was a polling agent of a rival candidate Raghuraj Singh. He says that Ramcharan Singh (the Respondent) himself told him that he would stage the drama. We do not think that we can accept this statement. If the drama was a part of the Respondent's scheme to secure votes by illegal means as alleged by the Petitioner, it is unlikely that the Respondent would disclose it to this witness. P.W. 2 mentions Respondent as one of the organisers of the drama. According to his evidence he did not know much about the staging of the drama before the actual performance and he does not speak of the presence of Ramcharan Singh at the drama. P.W. 3 is a Daffadar. He says that B. Ramcharan Singh informed him about the drama and that he saw him distributing notices in the Bazaar. But he cannot say what notices were distributed by the Respondent as he did not see any such notice. He further says that he did not see Ramcharan Singh particularly doing anything when the drama was being performed. As against this evidence P.Ws. 1, 2, 3 and 33 deny any participation by the Respondent. According to their evidence the Respondent had nothing to do with the drama and that the people concerned with the rehearsal of the drama were the young men of Kurtha. It may be that these young men of Kurtha had something to do with the Socialist Party of Kurtha. The anxiety of the Respondent's witnesses to emphasise that there was only a rehearsal of the play "Kasai" is obviously with the purpose of confining the activities in connection with the play to the actors participating in it. Although the evidence adduced on behalf of the Respondent is not very straight-forward the matter is not carried beyond suspicion and we think that the evidence led by the Petitioner does not satisfactorily establish that the Respondent was one of the organisers of the drama. It is to be remembered that the standard of proof in respect of corrupt practices is similar in nature to the standard required to establish a criminal charge [See Indian Election Cases by Sen and Poddar page 271 (at page 279); page 840 (at 843-844); page 353 (at page 359) and page 528 (at page 529)].

On this issue our conclusions are that the play "Kasai" is not objectionable in any way; that it was staged at Kurtha on the 27th December, 1951 but had no effect on the free exercise of electoral rights; and that it has not been proved that it was staged at the instance of the Respondent.

Issue No. 3.—The allegations against the Returning Officer are:—

1. That he bore malice against the Petitioner as the Petitioner had opposed his posting as S.D.O., Jehanabad.
2. That he persuaded the Bhumihaar candidates not to withdraw from the election with the object of dividing the votes in a predominantly Bhumihaar constituency and also succeeded in persuading Respondent No. 3, a Koeri candidate from withdrawing from the contest.
3. That he shifted several polling stations to places other than notified in the Gazette with the object of advancing the prospects of the Respondent to the prejudice of the petitioner.
4. That he connived at the performance of the drama "Kasai" with the object of prejudicing the Petitioner's cause.
5. That he connived at the illegalities and irregularities committed by various Presiding Officers.
6. That at several places he canvassed for the Respondent.
7. That he intimidated voters of Perriari and Lakhapur Mahal by withholding distribution of agricultural loan as these voters were not willing to vote for the Respondent.
8. That he maliciously diverted canal water to the prejudice of the voters of Lakhpur by erecting a Bandh elsewhere.
9. That he willfully neglected to comply with the law in the counting of votes in order to harm the petitioner.
10. That he celebrated the victory of the Respondent on the day the result was announced by him.

These are very serious allegations all of which have been denied by the Returning Officer who appeared before us as a witness (R.W. 28). It is necessary, therefore, to decide if he is guilty of the charges or to clear him of the charges. So far as the 3rd and 9th allegations set out above are concerned they would be properly determined under issue Nos. 7(a), 8, 10 and 11. The 4th allegation has already been dealt with under issue No. 2 but we would only like to add here that there is no evidence that the Returning Officer was in any way responsible for the performance of any drama. In fact the Petitioner has given no particulars of any acts of the Returning Officer in connection with the drama. The utmost that can be said is that he did not prevent the performance of the drama. We, therefore, hold that this charge against him remains unsubstantiated.

With regard to the first allegation of malice against the Petitioner the reason given is that the Petitioner had incurred the hostility of the S.D.O. as his posting at Jehanabad was opposed by him. The Petitioner (P.W. 27), admits that he did not know Shri Mukherjee before he actually came to Jehanabad as S.D.O. and the reason he gives for his opposition was that he preferred Shri Mitra, the previous S.D.O. who, according to him, was a very competent officer. He (P.W. 27) says that he had merely requested the Chief Minister and the Chief Secretary on the telephone not to post Shri Mukherjee at Jehanabad. Shri Mukherjee himself says that he was not aware that the Petitioner did not approve of his posting at Jehanabad. Of the knowledge of Shri Mukherjee about the Petitioner's opposition there is no evidence. In any case it was a matter that happened two years before the election and Shri Mukherjee's statement that he was on friendly and visiting terms with the Petitioner after he came to Jehanabad is not denied. It may be that the Petitioner, who was a Parliamentary Secretary, had attempted to prevent the posting of Shri Mukherjee at Jehanabad. But apparently since his posting there was no occasion, at any rate nothing is stated as to any cause of hostility on the part of Shri Mukherjee. The evidence and the circumstances lead us to conclude, that the Petitioner's apprehension regarding Mr. Mukherjee's attitude was fanciful.

With regard to the second allegation Mr. Verma for the respondent justifiably complaints that the particulars given are insufficient in the petition. It is said that the Returning Officer dissuaded Bhumihar candidates from withdrawing from the election. The candidates are not named. No time and place is mentioned. With regard to Raja Ram (Respondent No. 3) it is said that he contested the election as a result of the Returning Officer's pressure. P.Ws. 1 and 10 are the two witnesses on this point. P.W. 1 is Respondent No. 6 and P.W. 10 is Raja Ram (Respondent No. 3). P.W. 1 says that Raja Ram (P.W. 10) was there when the S.D.O. attempted to dissuade him (P.W. 1), from withdrawing. P.W. 10, who says that he was persuaded to contest the election says that P.W. 1 was there. Yet neither of them speaks of the S.D.O. persuading the other to contest. P.W. 1 was a polling agent of P.W. 10, a rival of the Respondent. From the circumstances stated above it is difficult to accept their evidence. In any event we believe Mr. Mukherjee when he denies that he made any attempt to dissuade any candidate from standing or withdrawing from the election. This point is decided against the petitioner.

With regard to the fifth allegation there are no particulars and hardly any evidence and the point was not pressed in argument. We hold, therefore, that the allegation of connivance with the illegalities and irregularities alleged to have been committed by the Presiding Officers is not true.

The 6th, 7th, 8th and the last allegations were not pressed although some evidence was led. Mr. Bashiruddin counsel for the petitioner very fairly gave up these points and refrained from asking questions to witnesses on these points when Mr. Verma for the Respondent at the time of the examination of the first witness on the point (P.W. 9), objected to the evidence being led as no particulars are given in the petition. We hold, therefore, that these allegations have not been proved.

On this issue, therefore, our conclusion is that none of the numerous allegations levelled against Shri B. S. Mukherjee, Returning Officer, imputing bias against the Petitioner, interference in the election and the like has been substantiated. As to any non-compliance by the Returning Officer with the provisions of the Act or the Rules made thereunder, the question would be decided under appropriate issues.

Issue No. 7(a).—The Petitioner alleges that booths of 7 polling stations were erected at places other than those notified in the list of Polling Stations (Exl. 2). Those Polling Stations are Shakurbad, Jethiara, Narga, Sikanderpore, Maanua,

Kodmarai and Dhamaul. The allegations in respect of the polling stations at Dhamaul, Kodmarai, Kansua and Narga were not pressed. With regard to the other three it is said that at Shakurabad, the polling station was shifted from the L. P. School to the M. E. School, at Jethiara it was shifted from the L. P. School to a place known as Bishunpura at a distance of one mile and at Sikanderpore from the L. P. School to a private house. There does not appear to be anything in the Act or in the Rules prohibiting the shifting of the polling stations from the notified place. There may be cases where a polling booth may have to be erected at another place after proper notice and it would be somewhat strange to hold that the authorities conducting the election would be powerless to set up a booth elsewhere if circumstances compel them. The only question therefore is how far a change has affected the result of the election.

The Petitioner's witnesses who speak about the change at Shakurabad are P.Ws. 7 and 27. P.W. 7 is a Daffadar who carried the ballot boxes from the polling station at Shakurabad to Jehanabad. He says that the polling took place at Shakurabad M. E. School. He also says that apart from this school and High School which is on the other side of the river there is no other school at Shakurabad. According to the list of polling stations (Ext. 2) polling was to take place at Shakurabad at the Lower Primary School. P.W. 27 is the petitioner himself. He says that the polling station at Shakurabad was shifted from the school to a private house but later adds that it was shifted to the M. E. School close to a village inhabited by Socialists. He further admits that the distance from the L. P. School to the M. E. School is only 500 to 600 yds. The Respondent's witnesses on the point are R.Ws. 4, 10, 13, 14, and 33. R.W. 4 is an M.A. and he was the polling agent of the Respondent at Shakurabad and Noawan booths. He gives the boundary of the Shakurabad L. P. School and says that the L. P. School and the M. E. School have a common compound wall. R.W. 10, who voted at Shakurabad says the same thing. R.Ws. 13 and 14, both voters, say that the polling took place at the L. P. School and so does the Respondent (R.W. 33). It is somewhat surprising that P.Ws. 1 and 17, who are both polling agents (*vide* Polling agent forms for Shakurabad pages 196-197) and P.W. 13, who is a Sarpanch say nothing about the shifting of the booth. No voter has been examined on behalf of the petitioner to show that he was misled by the change of the booth. We are of opinion that even if the polling station was shifted from the L. P. School to the M. E. School it did not affect the result of the election in any way.

The position is similar in the case of Sikanderpore polling booth. Petitioner's witnesses on the point are P.Ws. 4, 5 and 7 and the Respondent's witnesses are R.Ws. 11, 23, 24 and 33. The allegation is that the polling station was shifted from the Sikanderpore L. P. School to a private house. P.W. 4, the Daffadar, himself admits that the polling took place two or three rassis away from the Darwaza of Sant Pd. where the school is located. There is no evidence that any voter was misled and consequently the result of the election at this booth is not shown to have been affected.

The allegation with regard to Jethiara polling station is somewhat of a more serious nature since it is said that the polling took place about a mile away from the L. P. School which was originally fixed as the polling station. If this fact is true it affords a serious ground for thinking that the polling at Jethiara may have been affected by reason of the change. It is admitted by both the parties that the polling did not take place in the school building but outside in a tent which according to the Respondent's evidence was close by. The real point, therefore, is how far the polling tent from the school? The witnesses for the Petitioner on the point are P.Ws. 14, 16, 23 and 27. They all say that the polling took place in a tent in a place called Bishunpura more than a mile away from the school. The respondent's witnesses are R.Ws. 5, 6, 16, 22 and 33 and they all say that the tent was pitched in the particular land adjoining the school as one of the walls of the school had fallen down. If the Respondent's evidence is correct then it substantially satisfies the description of the polling station in Ext. 2 which is "Jethiara L. P. School". But the Petitioner can only succeed on this point if he establishes that the distance was considerable and was likely to cause and had in fact caused confusion amongst voters. We are inclined to think that the tent was pitched at some distance from the school but we cannot accept the Petitioner's version that the place was outside the village Jethiara. In fact the survey map as well as the electoral roll describes the village as Bishunpore—Jethiara. In the map (Ext. I), there is no mention of "Bishunpore". But the place marked 'Ka' in the middle of the village is "Bishanpur Chatra" according to the note appended to the map. In the electoral roll (Ext. H), at page 209 there is mention of "Tola Bishunpore". If Bishunpore, is a separate

village as alleged, or at any rate outside the village, it should have been possible for the petitioner to prove its location by better evidence than there is before us. The evidence does not make it possible to locate the place, where according to the petitioner the polling took place. It was for the Petitioner to clear up the point.

In any event, we are satisfied that the polling was not affected by reason of the fact that it did not take place at the L. P. School. In fact there was fairly heavy polling at Jethiara, on the first day (at booth No. 5) 45.6 per cent. of the electors cast their votes and on the second day (at booth No. 6) the percentage was 40.4 per cent. The average percentage in the entire constituency is 39.8. One would expect the effect of any change to be more pronounced on the first day rather than the second. It is noteworthy that on the first day the petitioner got 302 votes and the Respondent got only 87 votes. There is no evidence that the change had misled any voter. No voter has said so. In fact the evidence of P.W. 14, who is a Sarpanch shows that sufficient publicity was given to the place where the vote was to take place. He says that it was notified by beat of drums that voting will take place at Bishunpura. The Petitioner's witnesses who say that they went to the L. P. School also state that they were informed that the voting was to take place at Bishunpura and they went there. The Petitioner (P.W. 27), says that many of the voters could not cast their votes on account of this hasty change of the booth but he names none of them. In this state of evidence we are unable to hold that the shifting of the polling booth at Jethiara has materially affected the result of the election.

This issue is, therefore, decided against the Petitioner.

Issue Nos. 4, 6 and 9.—Issue No. 4 concerns the allegation that the Presiding Officers of various booths, permitted, with the object of helping the Respondent, various illegalities and irregularities, the allegations in respect of which are covered by issues 6 and 9. These allegations are:—

- (1) That at Noawan booth several persons who appeared with identity card issued on behalf of the Petitioner were improperly refused ballot papers on account of trivial printing errors in the electoral roll.
- (2) That on the 7th of January, 1952 the Presiding Officer at Noawan booth closed the polling 15 minutes before time and deprived about 200 voters of their franchise.
- (3) That on 8th January 1952, at Noawan polling booth several persons were given ballot papers in the name of dead and living persons on the electoral roll, in spite of the challenge by the petitioner's polling agent.
- (4) That several voters who are recorded in the electoral roll under village Rita Bigha, as well as village "Rim Bigha" voted twice at Kundla on 4th January 1952, and at Noawan on 8th January 1952.
- (5) That several persons were recorded in the electoral roll under village Sikandra as well as village Chak-Sikandra and voted twice.
- (6) That at Bansi Surajpore booth the Petitioner's polling agent was brow-beaten by the Presiding Officer who threatened to shoot him.

With regard to the first allegation seven instances are given in the petition. But evidence has been led in respect of two persons, Kammu Sain and Sidheshwar Misra. The name of Kammu Sain was printed in the electoral roll (Ext. H), as "Kammu Sao" against serial No. 91, house No. 326 of village Noawan and that of Sidheshwar Misra as "Sidheshwar Mistry" against serial No. 1256 house No. 152. Both of them have been examined as petitioner's witnesses No. 12 and 11 respectively. It is not disputed that they were not permitted to vote by the Presiding Officer although it is not admitted by the Respondent No. 1 that the two entries relate to these persons. In the case of Kammu Sain there was a challenge by a polling agent. It does not appear that Sidheshwar Misra's application for a ballot paper was challenged by any one. There is evidence that both these persons were identified by the Sarpanch. There is no evidence on the side of the Respondent that these entries relate to other persons. Rule 23(3) of the Representation of the People (Conduct of Election and Election Petition) Rules, 1951 (hereinafter referred to as "the Rules") lays down that in deciding the right of a person to obtain a ballot paper the Presiding Officer may interpret an entry so as to overlook merely a clerical or printing error provided that he is satisfied that such person is identical with an elector to whom such entry relates. Apparently therefore, the Presiding Officer was not so satisfied,

but unfortunately we are unable to gather from the evidence the reasons for his not being satisfied. There is nothing, however, in the Rules that makes the decision of a Presiding Officer conclusive and beyond the determination of any such question by the tribunal. We are of opinion that the Presiding Officer was in error in not interpreting the entry in favour of these two persons. The Petitioner, therefore, has succeeded in establishing that there was improper refusal to receive the votes of the above named two persons. Nevertheless this is immaterial because under section 100(2) (c) it is necessary that the result of the election must be materially affected by improper refusal of a vote. It has not been argued that such is the case here.

The second allegation is that the Presiding Officer closed the polling 15 minutes before time at Noawan booth on the first day and refused to record the votes of about 200 voters who were already inside the enclosure. It is not argued that the early closing of polling or refusal to receive the votes of some voters by itself is sufficient to vitiate the election at the booth although each of these allegations, if established, will amount to a breach of the Rules. Section 56 provides that the total period allotted on any day for polling shall not be less than 8 hours. Polling hours at Noawan being from 8 A.M. to 4 P.M. there would be less than 8 hours polling in contravention of Section 56 if the allegation is true. Rule 17(2) provides that the Presiding Officer shall close the polling station at the hour fixed (under section 56) provided that all electors present in the polling station before it was closed shall be entitled to have their votes recorded. Here again there would be clear breach of the Rules if the Petitioner's allegation is true.

The question divides itself into two parts—whether the polling station was closed before 4 P.M. and whether there were voters within the polling station at that time who were not permitted to vote. Considerable oral evidence has been led on these two points. The Petitioner's witnesses are P.Ws. 8, 11, 13, 15 and 17 and Respondent's witnesses are R.W. 4, 7, 8, 25, 29 and 33. The Petitioner's witnesses say that the booth was closed 15 minutes before the scheduled time and that there were 200 voters within the enclosure clamouring for ballot papers. P.W. 8, says that he had a watch and had checked the time when the booth was closed. The only thing suggested against him is that he had enmity with Respondent No. 1, who had helped one Narayan Gope in a litigation against his father. P.Ws. 13 and 15, say that they can't read the watch. P.W. 17, who was the polling agent of the Petitioner at Noawan says that he objected verbally to the Presiding Officer about the early closing and that the Presiding Officer told him that his watch was correct. All the Respondent's witnesses mentioned above say that the polling was closed at 4 O'clock. Unfortunately there is no documentary evidence, no written protest lodged and no written report by any one. It may be that as P.W. 13, says, "a hulla was raised that the polling was finished before time. But that does not mean that it was really before time. It is quite possible that some one who had a watch not showing the correct time may have raised a voice of protest which was taken up by the People assembled there. There is no evidence that the Presiding Officer did not have 8 hours polling according to his own watch. Whether his watch was showing the correct time or not is immaterial. The petitioner's polling agent (P.W. 17), says that when he raised the protest the Presiding Officer pointed out that it was already 4 O'clock by his watch. If that is so, then there does not appear to have been any breach of the Rules. If the polling commenced according to the watch of the Presiding Officer and stopped when his watch recorded 4 P.M. the mere fact that there was protest or clamouring will not indicate any breach of the Rules.

That however does not dispose of the matter. It is still to be determined whether at that time there were voters inside the enclosure who were not permitted to vote. The evidence of the Respondent's witnesses is not very convincing on the point. On the other hand the Petitioner's witnesses obviously exaggerated the number of the People supposed to be there. The Respondent's witnesses say that there was not a single voter inside the polling station at that time. It is impossible to determine in this state of evidence the number of voters that were there at that time. Mr. Verma for the Respondent has urged in this connection that there is no positive evidence that those people were really voters. In our opinion this is not of very great importance. It is obviously impossible to say who is a voter and who is not until they are interrogated by the Polling Officer under Rule 23. However that may be it is essential for the Petitioner to establish that the number of voters was so large that refusal of their votes would materially affect the result of the election. Thus in our opinion, the evidence has failed to prove. In fact there is not a

single voter coming forward to say that he was there and was refused a ballot paper. P.W. 17, mentioned five persons who were not allowed to vote. Out of them we find three had actually voted. The other two are not examined. We hold, therefore, that this allegation has not been proved.

With regard to the third allegation mentioned above three instances of impersonation has been alluded to in the evidence. It is said that two men Aklu Gope and Sheo Tahal Gope obtained ballot papers on the strength of two entries in the name of Aklu Pathak and Sheo Tahal Pathak—entries that did not relate to them; and that a lady voted in the name of Savitri Devi (serial No. 2014 in the electoral roll). This Savitri Devi finds mention in the list of challenged votes (exhibit 5) and she was eventually given a ballot paper on a written statement given by the Respondent. Respondent's evidence is that she is his daughter and the entry relates to her, but in the electoral roll there is a printing error showing her to be the wife and not the daughter of the Respondent. We think that the Presiding Officer was right in interpreting the entry in the manner he did and that the vote cast by Savitri Devi is a valid vote. In view of Rule 23(3) the error in her description is immaterial.

With regard to the two other persons Aklu Gope and Sheo Tahal Gope the Presiding Officer was satisfied that their names were wrongly recorded as Aklu Pathak and Sheo Tahal Pathak. The Respondent has examined both these persons and we believe their evidence. It is not necessary to discuss the evidence in detail as it is clear from the evidence of Petitioner's witnesses (P.Ws. 4 and 6), that Aklu Pathak and Sheo Tahal Pathak, if there were such persons in village Chagori, had died long ago. It is not denied that the house numbers given in the electoral roll are the numbers of the houses of Aklu Gope and Sheo Tahal Gope. On this question we hold that the Petitioner has failed to prove impersonation in respect of the three instances brought into evidence.

The fourth allegation is that several electors were recorded in village Rita Bigha as well as in Tola "Rim Bigha" of village Noawan. The Petitioner's case is that there is no such village as "Rim Bigha" within the polling booth of Noawan and therefore the voters recorded under "Rim Bigha" were illegally allowed to vote and further that they had already voted in the proper booth namely Kundla booth as duly recorded electors of village Rita Bigha. The Respondent admits that there is no such village as "Rim Bigha". According to his evidence "Rim Bigha" is a mistake for a Tola in Mouza Noawan also known as Rita Bigha. This allegation is contained in paragraph 15 (g) of the petition where the names of 13 persons are given as electors recorded under the same house numbers in two places, village Rita Bigha (within Kundla booth) and Tola "Rim Bigha" (within Noawan booth). This is borne out by the electoral roll (Ext. H). One of the persons was recorded as Phagu Gope. The Respondent had examined Phagu Ahir (R.W. 38), who is the only witness on this point. He describes himself as a resident of Tola Rita Bigha of village Noawan and states that he voted at the Noawan booth. If Tola "Rim Bigha" (Ext. H. page 279), is a mistake for Tola Rita Bigha then this is the man shown against serial No. 2391 house No. 17. If the petitioner is right he is also serial No. 23 house No. 17 in village Rita Bigha. As his serial No. and house number on the electoral roll was not brought out in the evidence his identity as a person mentioned in the petition as recorded twice is not free from doubt. There is no difficulty in understanding the petitioner's case because Ext. H shows clearly that the 13 persons mentioned are recorded against the same house numbers in two places. But the Respondent's case as argued is not very clear although he succeeds on this question on another point. In his written statement he merely denies double voting by voters of Rita Bigha. In his evidence he says that "Rim Bigha" in the electoral roll is really Tola "Rita Bigha" of that village. Under "Rim Bigha" (see Ext H page 279), there are 23 electors. Except 3 the rest are the 13 persons mentioned and the wives of seven of them. It is not the Respondent's case that there are 13 other persons of identical names in village Rita Bigha who are electors in Kundla booth. If there is a Tola Rita Bigha, on which we have the evidence of only two witnesses R.W. 33, (respondent No. 1) and R.W. 38, then the entries of the electors in Tola "Rim Bigha" relate to genuine persons although there may be persons of the same name in other villages. In that case we should expect the Respondent to make a case that the 13 persons who are entered under "Rim Bigha" did vote at Noawan as genuine voters of Tola Rita Bigha of village Noawan. This matter is left in confusion in the evidence.

However that may be, so far as this allegation is concerned the matter can be disposed of shortly. There is no evidence that any one of the 13 persons voted both at Kundla as well as Noawan. The Petitioner's witnesses on this point are P.Ws. 7, 13 and 14. P.W. 7, who is the Daffadar merely says that there is no village known as "Rim Bigha", a fact which is admitted. P.W. 13, who is a Sarpanch names the 13 persons but does not say that they voted at Kundla also. He could not say so because he was not on duty at Kundla. P.W. 14, who is another Sarpanch names the 13 persons and says that they voted at Kundla. He does not speak of Noawan. Respondent has produced only one witness (R.W. 38), whose evidence has been discussed above. The marked electoral roll of Kundla (Ext. Q/2) and Noawan (Ext. Q/1), however, make the position clear. They show that Fagu Gope, Madan Gope and Sagar Gope were the only three persons out of the thirteen who were given ballot papers at Noawan booth. Fagu Gope, Madan Gope and Sagar (Serial Nos. 23, 34 and 52 of Kundla booth) were not given ballot papers at Kundla. Similarly 7 persons were given ballot papers at Kundla but not at Noawan. Not a single person out of the 13 mentioned was given ballot papers both at Kundla and Noawan. No case of double voting has, therefore, been established and the point is decided against the Petitioner.

The fifth allegation is a similar one relating to entries in village Sikandra and Tola Chak Sikandra. From the pleadings and the evidence of the petitioner it is very difficult to say what exactly is his case. In para 15(g) he says that there is a village Sikandra and some voters of that village were also wrongly recorded in a fictitious Tola called Tola Chak-Sikandra of village Uchhta. In the evidence (see P.Ws. 5 and 6, the only witnesses examined on the point) it is said that there is no such village as Sikandra but there is a village known as Chak-Sikandra. Respondent in his written statement says nothing about it beyond denial that there was double voting. However that may be, the petitioner has failed completely to prove any case of double voting and the point was not seriously pressed.

The sixth and last allegation under this issue relates to the Bansi Surajpur incident. A number of witnesses were examined by both sides on this point. It is unnecessary to discuss the evidence because the point was not pressed. Mr. Bashiruddin does not dispute that even if the incident is proved it does not show that any provision of the Act or Rules has been contravened, or any ground has been established for setting aside the election.

As stated above issue No. 4 relates to the illegalities and irregularities the allegations regarding which have been dealt with under issue Nos. 6 and 9. On our findings on those issues, issue No. 4 is hardly material. In a general way a submission has been made, however, that the evidence establishes that the two Presiding Officers Shri R. P. Singh and Shri Bachu Singh have not acted impartially. For instance the Presiding Officer at Noawan booth while ignoring the mistake in the Electoral Roll in the case of Aklu Gope, Sheo Tahal Gope and Savitri Devi refused to ignore much less serious mistakes in the case of Kammu Sain and Sidheshwar Misra. It is true that the conduct of this officer in interpreting the entries does raise reasonable ground of apprehension in the mind of the Petitioner that he was prejudiced against him. But on the evidence it is difficult for us to say that the errors made by him in the interpretation of the entries were deliberately made to harm the Petitioner. There was a further allegation against Shri Bachu Singh of bribery. It is said in the petition that the Respondent supplied him with Ghce and two goats on two occasions. But this allegation was not sought to be proved by evidence. Apart from this the Petitioner wants us to draw the conclusion that the two officers were hostile to him from the fact that in the 17 booths in which they conducted the polling he had lost by a large margin. Shri B. P. Singh was in charge of 7 booths at Noawan, Shakurabad, Sikanderpore and Uchhta and the Petitioner polled 1292 votes in these booths as against 1888 that went to the Respondent. The other officer Shri R. P. Sinha was in charge of 10 booths at Kodmarai, Dhamaul, Bansi-Surajpore, Kusre and Narga where the Petitioner got 1497 votes as against 1934 that went to the Respondent. The difference between the votes secured at these 17 booths by the Respondent and the Petitioner respectively was 1033. The Petitioner's counsel has also given us a chart to show that in 35 other booths, except the four booths at Kurtha, where polling was conducted by other officers he led by 1025 votes. From this the Petitioner concludes that the dice was heavily loaded against him in the 17 booths in charge of the officers against whom he complains.

If we had found that the irregularities and the illegalities complained of were established there might possibly be a ground for suspecting that the result of polling reflects the manner in which the polling was conducted by the two

officers. But in the absence of positive proof of illegalities and irregularities it will not be proper to draw an inference against the two officers merely because the Respondent led by a wide margin at these booths. It has not been shown which provision of the Act or Rules was contravened by the two officers concerned. We, therefore, decide issue No. 4 also against the petitioner.

Issue No. 5.—The allegation of the Petitioner is that Mr. R. P. Sinha, the Presiding Officer of several booths submitted a false account of ballot paper in Form 10 under Rule 33. The 10 booths mentioned, two each in five polling stations are Kodmarai, (Booth Nos. 24 and 25), Dhamaul (Booth Nos. 26 and 27), Bansi-Surajpore (Booth Nos. 38 and 39), Kusre (Booth Nos. 40 and 41), and Narga (Booth Nos. 42 and 43). Rule 33 says that the Presiding Officer shall submit to the Returning Officer a statement in Form 10 showing (a) the total number of ballot papers received by him for each booth, (b) the total number of ballot papers returned by him to the Returning Officer as unused, tendered and returned ballot papers and (c) the total numbers of ballot papers which should be found in the ballot boxes. In Form 10 there are six columns to indicate these particulars. The Returning Officer has to make a statement in Form 14 to show the number of valid ballot papers found in the boxes for each polling booth. If there is any mistake in filling up any of these forms it can be checked up from the following data. The ballot papers contain serial numbers (see Rule 28). They are stiched in packs of 100 according to the serial numbers. The total number of such papers received by the Presiding Officer in each booth is recorded by serial numbers. Under Rule 23(2) when a ballot paper is given to an elector the Presiding Officer puts a mark against the serial number of the voter on the electoral roll used by him. This is known as the Marked Electoral Roll. He has also to record under Rule 23(2) the serial number of the ballot paper given to an elector. The serial number of ballot paper is put down against the serial number of the voter on the marked Electoral Roll. The unused ballot papers are entered by serial number in Column 3 of Form No. 10 by the Presiding Officer. It would be seen therefore that the total number and the serial number of ballot papers given to voters can be ascertained from the Marked Electoral Roll. These serial numbers as well as the total should tally with the Returning Officer's record under Form 14. The unused ballot papers which are put in sealed covers and sent to the Returning Officer by the Presiding Officer (*Vide* Rule 32) are available at the trial and their serial numbers should tally with that should be entered in column 3 of Form 10.

We have opened the sealed packets of unused ballot papers in open court and have found with reference to the marked Electoral Roll and the record in Form 14 that all the ballot papers with their proper serial numbers that should be available as unused ballot papers are there. What has happened is that in filling up the columns in the account of ballot papers for these 10 booths the serial numbers of unused ballot papers have been put in the wrong column or certain columns have not been filled. One instance may be given as a sample of the mistake that was made by the Presiding Officer. In booth No. 24, the Presiding Officer received 1150 ballot papers (serial Nos. 592451—593600). This is correctly shown in column No. 1 of Form 10. Against column No. 6 ("number of ballot papers in ballot boxes") is shown the following serial numbers 593600—592893 making a total of 708. It will be observed that the serial numbers began with the higher number whereas it should have been written as 592893—593600. These were the ballot papers that we found on opening the sealed packets of unused ballot papers. It is clear, therefore, that these figures should have been entered in column No. 3 for "number of unused ballot papers returned". The number of ballot papers used should be 442 to make up a total of 1150 and their serial numbers should be 592451 to 592892. On checking the Marked Electoral Roll Ext Q/7 we find that these were the actual ballot papers issued to the voters. The result therefore is that each ballot paper is accounted for although there has been some mistake in filling up Form No. 10. Firstly the serial No. of 708 ballot papers are entered in the wrong column, secondly that the numbers are given backwards starting from the higher number, thirdly the serial numbers that should appear in column No. 6 "No. of ballot papers in ballot boxes" was not entered. The same mistakes are committed in the Forms for booth Nos. 25, 26, 27, 42 and 43. With regard to the other four booths (Nos. 38 to 41), the only mistake is that column No. 3, is left blank. Mr. Verma for the Respondent who has taken considerable pains in this case has given us a chart, the correctness of which is not disputed, to show that the total ballot papers received in different booths is accounted for if we check up the relevant Ballot Papers Accounts with the number of ballot papers recorded in Form 14, the serial numbers noted in the Marked Electoral Rolls and the unused ballot

papers contained in the sealed packets. We are therefore satisfied that the misplacing of the serial numbers or the omission to fill up some columns in the Account of Ballot Papers in Form 10 is immaterial so far as the result of the election is concerned.

Issue Nos. 8, 10 and 11.—These issues relate to the counting of the votes of Kurtha Constituency on the 25th January, 1952. The petition contains numerous allegations regarding improper counting. It is said that (a) four ballot boxes of the Petitioner were found to be in tampered condition; (b) that the counting was done "simultaneously" at four tables; (c) that the Returning Officer did not allow the Petitioner's counting agent to note the figures of counting of each box as it was counted; (d) that the counting agent of the Petitioner was not given an opportunity to examine the seals of the boxes; (e) that the Returning Officer did not allow him to inspect the account of ballot papers nor was he given a copy of the result of counting and (f) that inspite of the demand of the counting agent no recounting was done. Points (c) and (e) were not argued and among the other points argued the only point that was seriously pressed was that at four booths the election was void because the Petitioner's ballot boxes from these booths were, at the time of counting, found to be in a tampered condition. The contention is based upon Section 58 and Rule 46(iv). Section 58 reads thus:—

"Section 58(1).—If at any election any ballot box or boxes is or are in any way tampered with, the election to which such ballot box or boxes relate shall be void, but only in respect of the polling at the polling station or stations at which such ballot box or boxes was or were used and no further."

(2) Whenever the polling at any polling station or stations shall become void under sub-section (1), the Returning Officer shall.... with the previous approval of the Election Commission, appoint a day for the taking of a fresh poll in such or every such polling station and shall not count the votes east at such an election until such fresh poll shall have been completed.

(3)

Rule 46(iv) lays down:—

"The Returning Officer shall also satisfy himself that none of the boxes has in fact been tampered with. If any ballot box is found by the Returning Officer to have been tampered with or destroyed or lost, the Returning Officer shall postpone the counting of votes and shall follow the procedure laid down in section 58....."

In our opinion this is the most serious point in the case. Before we deal with it, it is necessary to dispose of the three other points mentioned above which are raised in the arguments.

It is said that assuming that there was tampering of some boxes the Returning Officer failed to comply with the law in not recounting the votes. The question really does not arise. If there was tampering then section 58 would operate to render the election at the particular booths void. There is no question of re-counting but of a repoll. This will have to be examined further when we come to the main point. Actually the grievance regarding recounting was put in another form. It is the evidence of the counting agent (P.W. 22), that there was a quarrel with the Returning Officer at the commencement of the counting of the Petitioner's boxes and that he left the counting room. He says that when he returned after about 1½ hours he demanded recounting on the ground that counting was done in his absence. There is no provision in the rules for re-counting in such a case and we think that the counting agent of the petitioner had no right to demand recounting on this ground.

The next point urged that the Petitioner's counting agent was refused an opportunity to examine the ballot boxes. It is clear from the Returning Officer's evidence that the boxes were permitted to be examined by such candidates or their agents as were present and chose to examine them. We feel satisfied that Rule 46(iii) was substantially complied with and everyone present there had the opportunity to examine the boxes if they so liked. The provision does not require that the Returning Officer shall show the boxes to each one of them. It is sufficient that there is no prevention of inspection; and there is no evidence to that effect.

In the next place it is urged that the counting was done "simultaneously". Rule 46(vi) provides that one ballot box shall be opened and checked at a time and the counting of the votes of that box shall be completed before another

box is taken up for counting. Rule 46(v) provides that the counting of all the boxes of a particular candidate shall be finished before the counting of the boxes of another candidate begins. We find no allegation in the petition that clauses (v) and (vi) of Rule 46 were contravened. All that is said in the petition and in evidence is that the counting was done at four tables. It is not said that the boxes of four candidates were being counted at the same time at four tables. The Returning Officer R.W. 28, states "when the particular candidate's box was to be opened and his votes were to be counted that particular candidate or his agent came and sat near me a little to the right and then the box was called for. The seals etc., were shown to the candidate or his agent and thereafter the box was placed on the table in front of me and the box was opened and the lid lifted and all the votes taken out and put in a tray and then the counting began. This was done with each box separately of each candidate. The counting of votes took place regarding each candidate one after the other and not simultaneously. As soon as the counting of each box was completed the votes were recorded immediately." We are satisfied that the counting of one candidate's boxes was done at a time and that it was done in substantial compliance with clause (v) and (vi) of Rule 46. It is not the object of Rule 46 to prevent the counting of the boxes of a particular candidate by more than one counting party. To hold so would be to create an impossible situation where a large number of boxes had to be counted. Here in this Constituency each candidate had 56 boxes from 56 booths. If none of the other boxes are to be touched before the one that is being counted is finished with and if there are a large number of candidates the counting will take several days. What the Rule requires is that more than one box should not be opened at a time by the person counting the votes in the boxes. If some boxes are counted by one counting party and some others by another there cannot be any possible objection provided each counting party finishes counting of the boxes one by one. Such a procedure will not prevent the recording of the votes booth by booth, which is the real object which the Rule serves, however that may be, there has been no attempt on the part of the Petitioner to establish in what way the non-compliance of the provisions of Rule 46 in this regard has materially affected the results of election within the meaning of section 102(2)(c). As already stated above this point although raised was not seriously pressed.

We now come to the main question. The account of what happened at the time of counting is given in detail by Shah Zohair the Petitioner's counting agent. The other witnesses of Petitioner corroborate him on the main facts. According to Shah Zohair (P.W. 22), when the ballot boxes of the petitioner were first brought before the Returning Officer, he at once objected that four of the boxes were without seals. He has not referred to the "paper seal" which is inside the box and is visible through an aperture technically described as the "window". Therefore we take it that he refers to the outer seal which is put by the Presiding Officer at every polling station upon the piece of wire which secures the level of the box. According to his evidence when he mentioned this to the Returning Officer, the Returning Officer got very annoyed and there followed some exchange of words and it is said that the Returning Officer lost his temper and spoke harshly to him. Thereupon he wrote down a complaint in pencil about the incident and handing it over to the Returning Officer left the counting room. This petition is not on record. He returned after about 1½ hours and demanded re-counting. We are concerned here with the incident as a result of which he says he left the counting room. According to all the Respondent's witnesses except the Returning Officer, no incident of any kind took place between the Returning Officer and P.W. 22. Mr. B. S. Mukherjee (the Returning Officer) himself admits that an incident did take place. This is how he described it, "I remember that there was unfortunately an exchange of harsh words between me and the counting agent of Shah Umair Sahib but it was not concerning the counting. What happened was that I had known Shah Umair Sahib as well as his brother Shah Zohair Sahib for some time. I noticed just before the counting began and in the counting room that Shah Zohair Sahib was unshaved and with dishevelled hair and looked to me somewhat sick. I then asked him, 'are you sick?' At this Shah Zohair Sahib took objection and replied in the following manner more or less though not exactly in these words that 'you are cutting jokes with me. What do you think you are etc. I do not remember whether I gave any reply to this.' Some incident, therefore, is admitted. That it was more or less an unpleasant one is also not disputed. The question is which version is acceptable. We think that there are circumstances which strengthen the version given by Shah Zohair. In the first place the Respondent's witnesses who have come to support the Returning Officer on this point deny any incident whatsoever. Secondly the conduct of Shah Zohair after this incident and of the Petitioner when he learnt about this incident strongly

corroborates their version. Shah Zohair (P.W. 22), and the Petitioner (P.W. 27), both say that Shah Zohair took the earliest train after the counting from Jehanabad and came and reported the matter to the Petitioner at Patna. The Petitioner says that on the same night he sent a telegram complaining about Returning Officer's conduct to the Election Commission followed by written complaint to the Chief Electoral Officer, Patna, the Chief Minister and the Chief Secretary complaining about tampering and the illegal conduct of the S.D.O. in proceeding with the counting. It is difficult to believe the Petitioner's conduct as being the result of merely a breeze between the Returning Officer and his brother on some remarks about his appearance. It is also argued with great emphasis by Mr. Bashiruddin that there are inherent implications of great significance in the order sheet that the S.D.O. wrote on that day (Ext.D). Mr. Bashiruddin points out that the Returning Officer's order sheet does not explain any rules or procedure regarding counting and there must have been some special reason for explaining what he considered to be the law with regard to tampering. The recital referred to may be quoted; "Although there was no such occurrence it was made clear to all that mere damage to the outer seals or twine does not amount to tampering in fact so long as the paper seal below the window remains intact." We think that there is considerable force in Bashiruddin's suggestion. The Returning Officer explains this passage to which his attention was drawn by saying that he said so because possibly there was some instruction to Returning Officers to that effect. No such instruction is brought to our notice and it is somewhat strange that amongst numerous instructions only one is referred to although there is no occasion for it. The nature of the version that the Respondent urges upon us is not consistent with the probabilities. If Mr. Mukerjee knew the family of Shah Zohair. So well and if he thought that it was an appropriate occasion to make the remark about his appearance there is no reason why it disturbed Shah Zohair so much, that he should leave the room immediately. Even if the remark was not an opportune one and even if it caused slight annoyance to Shah Zohair one would expect the matter to be smoothed immediately by the person who made the remark by some sort of expression of regret. We cannot understand how such a matter would be allowed to develop into a situation which would cause Shah Zohair to leave the place with no one to look after such an important interest as his brother had in the counting of votes. From these circumstances one is led to conclude that there was a controversy between the two persons which goes to establish the truth of the version given by Shah Zohair himself. It may be mentioned that Shah Zohair's deposition before us appeared to be quite straightforward. The conclusion that we arrive at upon this point is that four boxes of the Petitioner were found in the state in which Shah Zohair described them to be.

But upon the question of fact as to whether there was tampering or not this conclusion does not advance the matter very far. Before one can say that a box is tampered with one must know the exact state of the box. Unfortunately the Returning Officer whose duty it was to form and record an opinion has not left us with any record. The petitioner's counsel urges, and we think with a good deal of justification, that there was, in the circumstances, a clear duty on the part of the Returning Officer to make a summary enquiry and give his findings. We have held an objection was raised as to the condition of the four boxes. The state of the boxes could only be gathered if some record of a summary finding was there. That evidence is lost. It cannot even be ascertained now in which booths the boxes were used. What happened to the four boxes may have been something trivial or it may have been a serious indication of actual tampering. If the Returning Officer had said only this, either in his order sheet or in his evidence before us, that although there was some damage of the outer seal the boxes did not show any signs of meddling, it could have been possible for us to determine with some certainty the question before us.

We have therefore to proceed on the basis that the four boxes had no seals as stated by Shah Zohair. The Respondent does not admit this position but his case has been argued on that footing. The controversy is this: according to the Petitioner if the outer seals are broken or damaged it is tampering within the meaning of Section 58 and Rule 46 according to the Respondent the fact that we have found does not constitute tampering and there is no question of the counting being invalid. Mr. Balbhadra Prasad Singh who was allowed to supplement the arguments on behalf of the Petitioner on this point contends that tampering is a matter of inference and that the circumstances in this case are such that that inference can be easily drawn. The word "tampering" has not been defined and therefore we have to proceed upon the ordinary dictionary meaning which is; to meddle with; to make unauthorised changes in etc. He says that it is impossible to prove tampering by positive evidence. If a thing bears

altered appearance or form it may be presumed that some one has meddled with it. He says further that if the Rules with regard to the sealing of the boxes, their transport and safe custody are followed, any change in the boxes can only be a result of some human agency meddling with it and is not capable of positive proof. In other words, although the matter was not boldly put in that form, we are required to apply the maxim *res ipsa loquitur*. We however think that it would be an extra application of the principle in a case like this. There are cases where a plaintiff can only show what has happened and it is too much to expect from him to show how it has happened. But they are cases where a thing shown to have happened could not have happened but for the laches or negligence of the person charged. A barrel of four rolls out of an open door way of the defendant's ware-house and injures the plaintiff on the street. The plaintiff can only show what has happened and rely upon the presumption that but for the defendant's negligence the thing could not have happened. [Byrne Vs. Boadle (1863) 2 H & C 722]. Such is not the case here. The very promise is questionable. Seals of a box may break whether someone has deliberately meddled with it or not. Indeed the more probable thing is that when the boxes were transported from various booths on country roads in trucks, the jolting would cause many of the seals to be broken. When hundreds of boxes are handled in this way, the presumption urged upon us would be an astounding presumption. But then petitioner says, How can I prove actual tampering; if a seal is broken by human agency how can a court make any inference unless a presumption is made? Although that is the unfortunate situation it cannot be said that it compels such a presumption. The fact has to be proved by the person alleging it and if it is not proved he fails. Such a situation of hardship is not unknown to law and came up for consideration before the Privy Council in *K. S. Agha Mir Ahmad Vs. Mir Mudassir Shah*, 71 I. A. page 171. The appellant's claim depended upon the proof of the fact that Lady Shamas Shah survived her husband. She was aged 26 and her husband was 68 and they both died in a common calamity viz. the collapse of a house in an earthquake. No evidence being available as to the time of their death the question was whether the plaintiff could rely on the presumption that the younger person survived the older. The Privy Council held that there is no such presumption. It has to be noted that the petitioner's argument is not that breaking of seals itself constitutes tampering, but that it leads to an inference of tampering unless the contrary is proved. We are of opinion that no such inference can be drawn in the circumstances of this case and consequently we hold that tampering of the four boxes with regard to which an objection was raised at the time of counting has not been proved. On that footing the question of the application of section 58 and Rule 46 does not arise.

An alternative point urged by the petitioner is that if tampering is not proved the failure to make enquiry by the Returning Officer as to whether there was tampering or not is a serious non compliance with the law and if we are of opinion that the non compliance has affected the result materially, we have jurisdiction to set aside the election under section 100(2)(c). In the first place Rule 46 does not in terms refer to the duty of making any enquiry. It says that the Returning Officer is to proceed under Section 58 if he finds that any box is in any way tampered with. With regard to his duties in respect of any objection regarding tampering nothing is laid down under the Rule in a mandatory form. In other words the Rule does not say that he has to stop counting when an objection regarding tampering is made but only when finds tampering. But the Petitioner says, with some justification we think, that he cannot find tampering unless he enquires into the matter and that therefore by implication there is a clear duty to make an enquiry whenever any objection is raised. We are inclined to think that such a duty is created by necessary implication. But if he has failed to make an enquiry that does not mean that the counting is invalid or that the election is void under Section 58; for, such a result follows only if tampering is found by the Returning Officer or proved at the trial. Mr. Verma rightly argues that the Petition has to show, on the assumption that there was no objection which the Returning Officer neglected to enquire into, how it has materially affected the election. In order to show that the result was materially affected the Petitioner cannot escape from the necessity of proof of tampering; for, we cannot assume that in some other inexplicable way the result has been affected.

Another point urged on behalf of the Petitioner is that even if tampering is not proved or cannot be presumed the breaking of the seals shows that Rule 34 has been violated and if we are of opinion that non-compliance with any Rule has materially affected the result of the election we may set it aside. Rule 34 provides for adequate arrangements for the safe transport of ballot boxes and

their safe custody. It is argued that the loss or breaking of seals proves that the arrangements made was not adequate and proper. The short answer is that seals may break accidentally notwithstanding the most adequate and proper arrangement for the transport and safe custody of ballot boxes. Moreover failure to make such arrangement by itself has nothing to do with the result of the election.

Mr. Awadhesh Nandan Sahay who was allowed to supplement the argument on behalf of the Respondent on this point raised another contention. He says that upon the pleading and the evidence the issue does not arise at all. According to him even if we assume all that the Petitioner says it does not, in law, amount to an averment of tampering. In order to allege tampering you have to allege alteration of the state of things inside the box. In other words according to him no amount of meddling with the outside of the boxes can amount to tampering. In practical terms his point is expressed by saying that there is no tampering unless the ballot papers are taken out or added to, or destroyed. There is therefore, according to Mr. Sahay, no way of giving any relief to the Petitioner even if we find all the facts alleged to be true.

We cannot accept such an artificial meaning of the word tampering. Indeed if that is the meaning to be given to the word then it is difficult even to make the allegation, that according to Mr. Sahay, is required to raise the issue. How can a Petitioner allege any change with regard to the ballot papers inside the box? Moreover a moment's reflection will show that the Returning Officer whose duty it is to satisfy himself about tampering is not required to comply with the standard suggested. Take an extreme case. The lid of a box shows marks of violence; a gap is found between the lid and the box. It is possible and indeed natural for the Returning Officer to conclude that some one has attempted to disturb the contents of the box. Yet cannot know, the state of the ballot papers until the entire counting is done and all the ballot papers are accounted for. This is the very thing he is enjoined not to do. In our view an article or physical object is tampering with not only when the inner contents are disturbed but also if there are outward signs of meddling.

Mr. Verma for the Respondent goes a step further and argues that even if what is alleged by Shah Zohair amounts to tampering the election cannot be set aside unless the result is shown to have been materially affected. He urges that in spite of the so called tampering, there is nothing to show that the number of valid votes counted in favour of the Petitioner and the Respondent respectively were not the number cast at the polling booths. It is further pointed out that votes can be mixed up only if the boxes of other candidates also were found tampered with which is not the case here. We propose to dispose of the matter very briefly, out of deference to the able arguments advanced by both sides although the question strictly speaking is immaterial in view of our finding that tampering has not been proved. The short answer to Mr. Verma's contention is that if tampering is proved it makes the election at the booths concerned *ipso facto* void under Section 58. It does not have to be declared to be void. If the election is void at those booths it cannot be said that the election as a whole is unaffected. It is partly invalid and necessarily affected. No one can doubt that it is impossible to predict what the result of a repoll would be and consequently it is impossible to assert that the result of the election has not been materially affected.

Our conclusions on these issues are that the four boxes of the Petitioner have not been proved to have been tampered with and that the result of the election has not been materially affected by the manner in which counting was done by the Returning Officer.

Issue No. 7.—This issue is dependent upon the issues that have already been discussed. The question is, did the alleged irregularities, illegalities and corrupt practices discussed above materially affect the result of the election and was the election of the Respondent procured or induced thereby? We have found that the Petitioner has failed to prove any corrupt practice within the meaning of Section 123 and Section 124 of the Act. Of the numerous illegalities and irregularities alleged by him we have found that he has proved the following irregularities:—(a) That two voters were improperly refused ballot papers at Noawan booth, (b) that the Account of ballot Papers in Form 10 for ten booths were incorrectly filled up and (c) that the Returning Officer failed in his duty to decide the objection raised by the Petitioner's counting agent regarding alleged tampering of ballot boxes. We have also held that none of those irregularities has affected the result of the election in any way. This issue must, therefore, be answered against the petitioner.

Issue raised by respondent No. 3.—Respondent No 3 has argued that the returned candidate Shri Ramcharan Singh was not qualified to stand for election. The reason given is that he was not duly recorded in the electoral roll. The argument is entirely based on Ext. 3 the application dated 17-10-51 by the respondent for correction of the entry relating to him. In this application he said firstly that the letter “न” in the end of his name should be changed into “ण” and secondly that his father’s name was left out by mistake and should be inserted, as there are other Ramcharans in the village. This application was allowed and he changes prayed for were made in the Electoral Roll by an order dated 22-10-51 passed by the S. D. O. Jehanabad as the Electoral Registration Officer of the Constituency. The argument of Respondent No. 3 is two-fold. Firstly, it is said that the entry originally made and finally published was admitted by wrong and consequently the Respondent was not duly recorded as an elector; secondly, that the corrected entry which relates to him will not remove the disqualification as the correction was illegally made. It is also urged that since the Respondent admits in his application Ext. 3 that there are other Ramcharan Singhs in the village the entry as finally published before correction does not identify him. The short answer is that it has never been denied that Respondent is not a person recorded as an elector. If the original entry had left out his parentage he does not cease to be an elector. Even if there are some mistakes in the name or description of an elector he does not cease to be an elector or lose his franchise. We have already referred to Rule 23(3) which permits such errors to be overlooked. In the second place it is admitted that there is no mistake of any kind relating to the entry as corrected. The correction is challenged as being invalid. It is said that it is the Election Commission alone which can authorise corrections of entries. But we think that section 25(b) of the Representation of the People Act 1950 puts the matter beyond argument. Section 25(b) reads as follows:—

“The Electoral Registration Officer.....on application made to him for the correction of an existing entry.....shall if he is satisfied that the entry relates to the applicant.....amend or cause the rule to be amended accordingly.”

In our opinion the objections raised by Respondent No. 3 as to the qualification of the Respondent are without substance.

Issue Nos. 12 and 13.—In view of our decisions on the other issues in the case we hold that the Petitioner is not entitled to any relief and that the election of Respondent No. 1 to the Bihar Legislative Assembly from the Kurtha Constituency is valid. It is, therefore,

ORDERED

That the Petition be dismissed with consolidated costs (including hearing fees) which we assess Rs. 750/- only.

(Sd.) S. N. IMAM, *Chairman.*

K. D. CHATTERJI, *Member.*

(Sd.) RAMANANDAN PRASAD, *Member.*

The 24th May, 1954.

[No. 19/113/52-Elec.III/11437.]

By Order,

K. S. RAJAGOPALAN, *Asstt. Secy.*